EMPLOYMENT TRIBUNALS

Claimant: Mr S Hoare

Respondent: Jaguar Landrover Limited

HELD AT: Liverpool (in person hearing and CVP) **ON:** 25, 26, 27, 30 & 31 January 2023

BEFORE: Employment Judge Shotter

Members: Ms C Neild
Mrs JE Williams

REPRESENTATION:

Claimant: In person
Respondent: Ms Rumble, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent was not in breach of its duty to make reasonable adjustments. The claimant's claim of disability discrimination on the basis the respondent had failed in its duty failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 is not well-founded and is dismissed.

2. The complaint of disability discrimination brought under section 20 to 21 of the Equality Act 2010 for the period between 19 September 2019 to 23 March 2020 was lodged outside the primary limitation period, it is not just and equitable to extend the time limit to 12 April 2022 and the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

3. The claimant was not unfairly dismissed and his claim for unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

The hearing

1. This is a liability hearing held in person. The documents that the Tribunal was referred to are in a bundle of 511 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a bundle of witness statements including the claimant's second witness statement, the claimant's first witness statement at page 402 of the bundle, an agreed chronology and agreed list of issues that was amended to reflect the time limit issue and the respondent's concession that the claimant was disabled with ulnar neuritis during the relevant period.

2. At the preliminary hearing held on the 15 August 2022 a summary of which was sent to the parties on 24 August 2022 the claimant confirmed he was not bringing claims under sections 13, 15, 19 and 27 of the Equality Act 2010 ("the EqA"). In the second witness statement the claimant refers to raising complaints under section 13 and 15 of the EqA for the first time, and confirmed subsequently to the Tribunal that he was not seeking to amend his claim to include these complaints and the record set out in the Case Management Summary was correct.

Claimant's disability

3. The claimant relies primarily upon the condition of ulnar neuritis, affecting his arm, elbow and shoulder. He also has the conditions of severe asthma and agoraphobia. The case management summary of the 15 August 2022 hearing records that the claimant confirmed his ability to carry out certain work on the production line was adversely affected by his primary disability, ulnar neuritis, whether in combination with the other disabilities or not. He complains that the respondent failed to make reasonable adjustments for him and that it was unfair to dismiss him in these circumstances.

4. The respondent accepts the claimant was disabled with ulnar neuritis and that it had knowledge of this. It also now accepts he was disabled with asthma but knowledge is in issue. The claimant was not relying on agoraphobia and this condition was not an issue.

The pleadings

5. In a claim form received on 12 April 2022 following ACAS early conciliation between 23 February and 8 March 2022 , the claimant, who at the time was employed as a production line worker (a semi-skilled job) claims the respondent failed to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA. The claimant complains he was unfairly dismissed because the respondent should have found

him alternative employment within his physical restrictions, and the reasonable adjustments should have been made from September 2019 when he started to struggle with his right arm carrying out his role on the assembly line using a large heavy Bluetooth gun to fix bonnet laches.

6. The respondent disputes the claimant's claims, in short, it's case is that the claimant was restricted due to his disability of ulnar neuritis and other medical conditions, he had the option of trialling any available suitable job in the factory and due to the extent of his physical restrictions, there were none due to the claimant's incapacity. The respondent also argued there were time limit and jurisdictional barriers to the claimant proceedings with his 2019 complaint.

Agreed issues

7. The parties agreed the issues as follows:

UNFAIR DISMISSAL

1. What was the reason for dismissal? It is not disputed that the claimant was dismissed for capacity.

2. Is the reason a potentially fair reason under s98(2) Employment Rights Act 1996? It is not disputed that capability is a potentially fair reason.

3. Did the Respondent act reasonably in all the circumstances of the case, following a fair procedure, in treating that reason as sufficient to warrant dismissal? This is the key issue.

4. If the employer acted unfairly procedurally, what are the chances the employment would nevertheless have ended by fair dismissal if a fair procedure had been followed?

DISABILITY

5. The Respondent accepts that the Claimant was a disabled person as a result of his ulnar neuritis and asthma. The Respondent accepts knowledge of disability relating to ulnar neuritis and not asthma at all material times 9 September 2020 to 13 January 2022.

6. Did the Respondent know or ought reasonably to have known the Claimant suffered a disability (asthma)?

7. Did the Respondent know or ought reasonably to have known of a substantial disadvantage caused by the Claimant's asthma?

s.20 Equality Act 2010: REASONABLE ADJUSTMENTS

8. Has the Respondent imposed a Provision, criterion or practice (PCP) which places or placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled contrary to section 20(3) of the Equality Act 2010?

8.1 Did R impose a practice whereby employees must carry out their contracted job role?

8.2 Did this practice amount to a PCP that put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

8.3 Did the Respondent take such steps as were reasonable to take to avoid that disadvantage? The Claimant contends that the reasonable adjustment would have been to allow him to undertake an alternative role within the factory.

8.4 Was it reasonable for the Respondent to make the adjustment? The Respondent submits that to the extent it did not offer any such reasonable adjustments, it would not have been reasonable to make them and/or that such adjustment would not have ameliorated the disadvantage.

s.123 Equality Act 2010: Time Limits

9. Are discrimination complaints relating to the period between 19 September 2019 - 23 March 2020 outside the primary limitation period?

10. If so, was the claim brought in such other period as the employment tribunal thinks just and equitable?

Remedy

11. If the Claimant succeeds in any of the above claims, what level of compensation is he entitled to in respect of:

    a. Financial Loss
    b. Injury to feelings

Evidence

8. The Tribunal heard evidence under oath from the claimant and on behalf of the respondent it heard from Gary McLoughlin, production manager who dealt with stage 2 of the Restricted Workers Process referred to as "RWP," Nicholas Teasdale, manufacturing manager who dealt with stage 3 of the RWP, Jason Wilding production manager who dealt with the employment review and was the dismissing officer, Stuart Comes, manufacturing manager who heard first stage appeal and retired technology manager Ian Holden, previously employed as technology manager, who heard the second stage appeal.

9. The Tribunal did not find the claimant to be a credible witness at times as recorded in the finding of facts below when it resolved the conflicts in the evidence, preferring the more credible evidence given by witnesses appearing on behalf of the respondent which was largely supported by contemporaneous documents whose content was undisputed by the claimant.

10. The Tribunal was referred to an agreed bundle of documents and having considered the oral and written evidence and written and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the written and oral submissions, but has attempted

to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

Facts

11. The respondent is a prestige car manufacturer and retailer with a factory based in Halewood in Liverpool and the Midlands. In the Halewood manufacturing site two types of vehicles are built; Range Rover Evoque and Range Rover Discovery Sport. The vehicles are built on an assembly line by production operatives referred to individually as an "associate." There are approximately 2,500 employees working in the factory, the vast majority carry out semi-skilled work in the manufacturing plant, and it undisputed there is no lower grade work available. The respondent employs office workers who are not involved in the act of physically building the vehicles, such as the technical clerk vacancy when specialist skills including Excel, PowerPoint and use of data base are a necessary qualification. The claimant had little if no IT skills; he found it difficult to access the respondent's online list of vacancies available to all employees on his phone and there was no suggestion during the entire RWP process that office work of any sort was suitable alternative employment he could have carried out with or without training, and so the Tribunal found.

12. The factory was divided into sections referred to as "technology areas" and the claimant worked in the area known as "Trim and Final" which takes the body shell through to completion. There are 4 sub-areas "trim," "final," "North Works," and "Off Track." The trim area has 5 lines, and the claimant originally worked on trim line 4 referred to as T4. The vehicle is carried along on a chain, and as it progresses through the assembly line the body of the car is built with the final act being wheels which are added before validation and final inspection. It is undisputed that the work is very physical, repetitive and strenuous requiring the use of power tools including but not exclusively a large heavy Bluetooth gun the claimant used before Coronavirus lockdown on T4.

13. . Between 283 and 300 cars are built every day. The production line is structured breaking down the tasks that are time sensitive with one job depending on the other for completion. Employees carry out a very small section of the build, for example, one employee would be using a power tool to screw in a particular part and another employee checking over one section of the body. Employees mirror each other on the assembly line, for example, the bonnet and tailgate would be checked at the same time by two employees one dealing with the bonnet the other the tailgate before the vehicle continued down the assembly line.

14. It is undisputed that the employees/associates had 86 seconds to carry out their allocated task in 95 percent of cases, before the next car came on the track. The process covered 300 stations; other areas are slightly faster such as assembly areas at 84 seconds and some areas slower. Some roles took slightly longer, for example, 4 employees all checking the vehicles could take 5 minutes. The Tribunal were given a physical demonstration of an employee carrying out a check of one part of the car looking for paint defects and the Tribunal was satisfied that the role entailed walking 3-4 strides every 86 seconds, bending (which the claimant could do) and twisting (which the claimant could not do) to see the reflection and grade of the paint. If the tasks cannot be completed and/or there is a faulty completion within the 86 seconds allocated the employee pulls an emergency cord and the whole line stops. If the line is not stopped the vehicle goes forward with the defect and it is picked up as a quality check which triggers an investigation. It is difficult to adjust the different roles, and there can be a minor adjustment if possible with the limitation that an

employee is required to carry out at least 95 percent of the task with the remaining 5 percent distributed amongst colleagues on the line with levelling up of duties as the whole task needs to be completed with 86 seconds. The Tribunal found on the balance of probabilities that the assembly line process was an insurmountable barrier to the claimant being provided alternative employment within his physical limitations despite the size of the respondent, on the evidence before it.

15. The respondent assessed and documented each individual task ergonomically. The ergonomic analysis followed international standards for effort and could change depending on whether or not variations were made to the task/line. The Tribunal was taken to an Risk Factor Checklist for a headliner check, post check and Sunvisor check at Workstation T4 SIP and on the balance of probabilities it accepted that the risk factor checklist was designed for those employees who had no physical restrictions and not all the details of the task was set out.

16. The respondent is unionised and union representatives are actively involved in applying a number of the policies and procedures, including the RWP where they perform the vital role of assisting employees seeking suitable alternative roles when incapacitated as a result of ill-health. It is notable at para. 3 of the Standard Conditions of Employment signed by the claimant it is a requirement that hourly graded employees such as the claimant "should belong to an appropriate trade union."

Respondent's policies and procedures relevant to this claim.

17. The respondent issued employees with a number of policies and procedures including a Restricted Workers Process known as "RWP." The RWP was regularly applied to employees with the assistance of the trade union when an employee has a restriction on place that prevents them from carrying out their role whether permanently or temporarily because of ill health or incapacity. There are 3 stages;

a. Stage 1 provides that "your production leader/manager should consider all placement opportunities for you within their area and document the search on the Stage 1 form. **This can be done in conjunction with the TU representative**… [my emphasis]. This stage should take 1 week where practicable." The Tribunal did not accept the claimant's argument that stage 1 required a stage union representative to be involved, concluding on a common-sense interpretation on the written Policy that the claimant had the opportunity to involve the trade union at this early stage in comparison to second stage where there was a requirement for the involvement of a trade union representative as an integral part of the process. The undisputed evidence before the Tribunal, as recorded in fuller detail below, was that trade union representatives possessed a considerable amount of expertise in the applying the RWP, ranging from an awareness of what jobs could be suitable in their working areas and who was doing what in relation to roles that were held by employees with restrictions through to accompanying employees at the various meetings set out within the procedure.

b. Stage 2 provides for a meeting(s), a self-assessment form completed by the employee to be reviewed by occupational health and a "search of all placement opportunities in the technology/function area should be completed." Reference was made to "this can be done in conjunction with the TU representative" and

"if no opportunities for placement are identified you will be invited to a stage 2 feedback meeting…This stage should take 4 weeks (where practicable)".

c. Stage 3 provides a Placement Committee/Plant governance/Plant Joint Committee should be notified of the requirement to conduct a Plant/site search. "The committee will consider all placement opportunities across the site an identify up to 3 suitable roles for you to trial. Suitable roles are defined as roles which meet the requirements of the adjustments as outlined in the occupational health report and as agreed with occupational health. The role must be a **recognised full upstanding role and will be at your existing grade**" [my emphasis]. A feedback meeting is required and "if no suitable opportunities have been identified by the committee…the case will progress to an employment review hearing. This could result in action being taken, including dismissal on the grounds of capability." This stage should take 6 weeks where practicable".

d. The Tribunal heard undisputed evidence on the difference between a full upstanding role and a temporary non-RTO role. A full upstanding role is a role that meets the employee's contractual requirement, for example, the claimant's original role defined as integral to the business and the daily operation of the manufacturing operation including the assembly line. The temporary non-RTO role was an ad hoc series of jobs, such as sweeping, picking up cardboard or checking paint as in the claimant's case, offered as an adjustment to keep employees in work until the RWP is exhausted. The undisputed evidence before the Tribunal was that most employees with restrictions were found alternative roles and did not progress to an employment review hearing.

e. A Placement Committee/Plant governance/Plant Joint Committee is defined as follows: "is a forum to ensure suitable opportunities for placement are explored. It will be chaired by senior management, appropriate representatives from line management, HR case management team, TU representatives, manpower planners an occupational health. This stage should take 1 week." The claimant submitted that TU representatives should attend the meeting, and in relation to his meeting there was none. The Tribunal agreed, and has dealt with the impact of this further below.

f. The employee's role was set out and included registering with HR direct interest for internal vacancies to identify opportunities, "give serious thought as to what activities may best be suited to the confirmed level of restriction…notify the company of any change in medical condition and…fully engage at all stages of the restricted workers process".

g. The role of Occupational Health was set out including advice on ergonomics and referral to specialist treatments. The undisputed evidence before the Tribunal was that occupational health possessed a specialist expertise and knowledge concerning the respondent's processes i.e. the assembly line jobs, and regularly assessed employees to determine their suitability and recommending adjustments be put in place depending on the nature of the health condition. The report prepared by Occupational Health was agreed with the employee before it was sent to the manager who had commissioned the report in the first place.

The claimant

18 The claimant was 50 years old at the effective date of termination. He was employed by the respondent at Halewood in the Trim and Final Department on the production line as a Production Operative, a semi-skilled role. Approximately 1500 employees worked in the Trim and Final department in which there was over 500 different jobs that revolved around the manufacturing of cars on the assembly line.

19 He was first engaged by the respondent as an agency worker from 1 August 2014. It is agreed that his employment otherwise commenced on 19 August 2015 as a production associate as an hourly graded employee at grade 3 and the claimant signed the contract accepting the terms and conditions on the 29 October 2015. At clause 12 reference was made to the grievance procedure that included "discussing it with your immediate supervisor" and the Employee Handbook if it was referred on.

20 The respondent concedes the claimant was disabled with the condition of ulnar neuritis, affecting his arm, elbow and shoulder and severe asthma during the relevant period. It was clear to the Tribunal that the claimant's physical limitations were numerous taking into account the evidence given by the claimant and the list of medications he provided during the liability hearing. It is undisputed the claimant's ability to carry out certain work on the production line was adversely affected by ulnar neuritis, in addition to a number of other medical conditions. The claimant agreed at this liability hearing he was unable to carry out his role working on bonnet laches or any work that required the use of heavy equipment.

21 The Tribunal concluded that during the relevant period of this litigation between September 2019 to the effective date of termination the claimant was disabled under section 6 of the EqA with severe asthma and ulnar neuritis. The claimant according to his evidence took approximately 21 different types of medication at any one time for a variety of medical conditions including the disabilities. The claimant had a long-standing injury to his arm and restricted range of movement from 2002 which did not prevent him from carrying out his contractual duties until 19 March 2020 when he was in "severe pain", although he had problems in late 2019 with his right arm that resulted in the claimant being referred to occupational health and adjustments being suggested.

Occupational Health provided a report on the 16 September 2019

22 Occupational Health provided a report on the 16 September 2019 that suggested temporary adjustments as a result of the Claimant's limited use of right arm with a review date on the 14 October 2019. The claimant was deemed fit for work on his full shift patten. The Tribunal accepted the claimant's evidence that no adjustments had been put in place. He continued to carry out his contractual duties without any breaks in the line or issues for the respondent.

Occupational Health provided a second report dated 2 October 2019

23 Occupational Health provided a second report dated 2 October 2019 confirming the adjustment had not been implemented due to an administrative delay and claimant was recommended for a "green role not amber or red for shoulder, elbow and hand." The claimant now disputes that the work he carried out in T4 was a green role, however, he wanted different type of work whatever label was given to it. The Tribunal accepted the claimant's evidence that no adjustments had been put in place and he needed an adjustment to his role, and that remained the case until the claimant returned to work from furlough following

the Coronavirus Pandemic, on 6 September 2020. There was no duty on the respondent to make reasonable adjustments when the claimant was furloughed and so the Tribunal found.

Time limit

24 Between September 2019 to 23 February 2022 when the claimant commenced ACAS early conciliation, there was nothing to prevent to the claimant from issuing proceedings before, during or after the Coronavirus Pandemic and the Tribunal did not accept the claimant's evidence that he was unable to issue proceedings as a result of being on Furlough or shielding. Proceedings are issued online and the claimant as a union member had access to union assistance. The Tribunal concluded that the claimant chose not to issue proceedings as he was satisfied with the adjustments that were made when he returned to work and progressed through the Restricted Worker Process. The claimant had no intention of issuing proceedings until he was dismissed and so the Tribunal found.

25 On the 19 March 2020 there was an issue with the claimant dropping a blue tooth gun whilst carrying out his duties and the line was stopped. This was the last time he worked on the assembly line T4 (bonnet laches). The claimant was then furloughed due to the Coronavirus Pandemic. The primary limitation period expired on the 18 June 2020 and the Tribunal found there was no reason the claimant could not have issued proceedings in that period.

Respondent's knowledge of asthma.

26 On the 29 May 2020 the claimant was assessed by the respondent as being "extremely vulnerable." There appears to be no written record of the reason why the claimant was assessed as extremely vulnerable in the document. It is apparent from the GP Fit Note in the agreed bundle that from 19 March to 31 May 2020 the claimant was unfit for work due to his right shoulder and arm pain. A fit note dated 27 May 2020 confirmed the claimant remained unfit but qualified for a Covid shielding letter due to asthma. The claimant submitted that the respondent was aware of his asthma condition evidenced by the level of vulnerability assessed as "extremely." Ms Rumble submitted that there was no evidence the respondent had knowledge of the asthma condition, and the Tribunal could not conclude the Employee Risk Report(referred to further below) was in relation to the claimant's asthma. On the balance of probabilities the Tribunal preferred the claimant's submissions and concluded it was more likely than not that the respondent was fully aware of the claimant's asthma condition and the fact he qualified for a Covid shielding letter as a result and this was the reason he was deemed extremely vulnerable. There was no other medical condition that could put him at an enhanced risk during the Coronavirus Pandemic. However, it was also satisfied that the claimant's managers were not made aware of the asthma condition either by the claimant or anybody else until after termination of employment.

Respondent's date of knowledge

27 The Tribunal concluded, taking into account the claimant's evidence that he had kept his asthma condition to himself, the respondent had knowledge in around the 29 May 2020 at the latest and managers possessed no knowledge and nor could they reasonably be expected to posses it the claimant having taken the view that asthma condition was personal to him and confidential.

Restricted Worker Process stage 1

28 On the 8 September 2020 when the claimant returned to work from furlough the claimant became an unplaced restricted worker. Reasonable adjustments were put in place until the effective date of termination. He remained in the trim section and was given ad hoc duties including sweeping up and down the line, picking up cardboard, cleaning the frames the cars hanged on, checking on vehicles before they went further into the system and on occasion going across to other sections of the factor, for example, Quality, at the request of line managers to carry out quality paint checks outside the trim and North Works area, for example in Off Track. It was clear from the claimant's evidence that he had access to a large part of the factory in addition to his own area, and he would have seen the types of work available in the individual areas and in a position to make a judgment as to whether the roles could be suitable alternative employment for him to trial as part of stage 1, 2 or 3 of the RWP and so the Tribunal found.

29 The first part of the Restricted Worker Process involved the claimant looking in his home area Trim (T4) for suitable duties to see whether he was happy to trial them with his restrictions in mind. The claimant was familiar with the roles and informed the respondent that there were no suitable alternatives in his home area T4 and he completed a Restricted Worker Role Search form on the 8 September 2020 setting out the effect of the roles on his arm confirming he was "unable to extend pain in shoulder and elbow…wrist."

Restricted Worker Process stage 2

30 As a result of the claimant's indication that there was no suitable alternative work he could carry out in T4, the RWP advanced to stage 2 and became more formal. Gary McLoughlin the production manager wrote to the claimant on 14 September 2020 informing him that following the stage 2 meeting that had taken place on 9 September 2020 the claimant was now at stage 2 and reference was made to the RWP Policy a copy of which was provided to the claimant. The right of the claimant for trade union representation was set out, and the Occupational Health report confirmed the claimant's duties should be limited to green mapped roles for shoulder, elbow and hand as a temporary adjustment with a review, expiring 15 July 2020.

First stage meeting 22 September 2020

31 The first stage 2 meeting with Gary McLoughlin took place on the 22 September 2020 at which the claimant was supported by a trade union official. The respondent's undisputed evidence was that the trade union representatives were very experienced in the RWP which had approximately 100 employees in the process at any one time requiring temporary or permanent adjustments. It was undisputed that the majority of employees resolved the position at stage 1or stage 2, very few entered into stage 3 and it was rare for an employee to be dismissed on the grounds of capacity. The evidence given of behalf of respondent by witnesses was that trade union representatives were also aware of what the roles entailed on the factory floor, the ergonomic assessments and when they changed, what roles were vacant and most importantly, what roles were suitable for employees with restrictions, such as the claimant, and whether they had already been taken up by other physically restricted employees. The trade union representatives were a very important part of the process, and it was clear to the Tribunal that managers held a great deal of respect for the union representatives and the input they had.

32 In oral evidence at this liability hearing the claimant complained that his managers did not allow him to look at or trial possible suitable alternative employment in his home area and he was required to carry duties which prevented him from looking and searching. In addition, the claimant gave oral evidence that he was unable to look at how his colleagues carried out their role to see if it was suitable for someone with his restrictions because the line was not Covid safe. On the balance of probabilities the Tribunal did not accept the claimant's evidence as credible preferring Gary McLoughlin's evidence that there was an isle along the production line a meter away, a stock line and a walk way so it was possible for the claimant to (a) wear PPE, (b) ensure other employees were complying with Covid rules, (c) keep sufficient distance and (d) look at the QPS booklet which showed step-by-step what the roles required. The Tribunal also took into account the fact that the claimant was fully aware of the different roles and their suitability and had communicated in his form that a number were not suitable.

33 It is notable at the 22 September 2020 meeting the claimant raised none of the criticisms referred to in his oral evidence at this liability hearing, and had this been an issue at the time, i.e. managers preventing him from finding a suitable role he would have said so bearing in mind it was made very clear to him by Gary McLoughlin that "OH, Mgt, HR and TU we will work together to find a role…the process has had loads of success and the vast majority of people are placed in stage 2." The claimant was informed stage 2 would take no more than 4 weeks and he was aware that time was off the essence. In short, had he been prevented by management from looking at or trialling possible suitable jobs the claimant would have raised this as an issue, and at the very least inform his trade union representative who accompanied him at the meeting. The claimant had made it clear to managers at the time that he believed he had been ignored when "arm and shoulder was killing" and "**now simple jobs he can't do because of the vibration**" [my emphasis]. The claimant was informed that "outside of the meeting he can speak to SF [trade union] and discuss avenues to take rather than letting things build up and fester." He was aware that his trade union representative would assist him with locating trial roles and in his search for alternative employment.

34 The claimant continued to work in the ad hoc temporary role which met his physical needs and amounted to reasonable adjustments. During this period the claimant was given a minimum of 8 weeks to find and trial suitable alternative employment with the assistance of the trade union and managers before the he was placed on furlough.

35 The restricted worker process stopped when the claimant was put on furlough due to the Coronavirus Pandemic on 4 November 2020 to 4 December 2020. By that stage no suitable employment had been found. The claimant completed a stage 2 restricted Worker Role Search Form for occupational health that recorded a total of 101 different roles the claimant had looked at, none of which were suitable. The claimant set out a number of reasons why he considered the roles to be unsuitable ranging from pain in elbow, shoulder and back, pain in hip if stepping on platform, pain in hip when walking, hip twisting, arm, reaching up, elbow reaching tailgate, right arm above head height twisting, hip inside car, twisting hip. In relation to carpets asthma, and then back twisting, hip walking turning ramp and so on. The Tribunal took time to read through all of the entries and nowhere did the claimant make any reference to using his left hand, which was one of the arguments put forward during the liability hearing.

36 The claimant returned to ad hoc adjusted duties on 4 December 2020 before going off on furlough between 5 January 2021 to 4 April 2021, and had not found any work suitable for him to trial. The claimant was not expected to consider alternative employment during

furlough, but was expect to proactively look at possible roles (including vacancies) with a view to establishing whether they were suitable for him or not, and liaise with the union and management. None were found.

14 April 2021 Functional Assessment Form

37 On the 14 April 2021 the claimant completed a Functional Assessment Form confirming he could walk up to half a mile and had "**difficulty walking at a normal pace** [or] brisk pace for 20 minutes" [my emphasis]. In direct contradiction to the claimant's evidence at this final hearing, the claimant set out in the form that he had difficulty "**repeatedly bending…squatting…twisting from side to side either while sitting or standing…have …problems lifting both your arms above shoulder height**" [my emphasis]. The claimant did not say he had problems only with his right arm. The claimant also confirmed he was able to only manage "slight exertion" had problems carrying 5-10kg, had "difficulties during or after lifting or carrying heavy objects repeatedly or for long periods…pulling or pushing heavy objects. Undertaking repeated gripping or twisting actions with **either hand or arm**, e.g. taking a lid off a jam jar, using a screw driver, using a vacuum cleaner using an iron" [my emphasis]. The claimant's evidence before the Tribunal that he was able to use his left arm and hand to carry out alternative roles including using a lighter gun, was undermined by how he described his physical limitations to assist Occupational Health. It is clear from some of the claimant's other answers given on the form that if he was not sure he would have said so, and reference could have been made to the claimant being able to use is left arm/hand if he thought that was the case.

38 The claimant also completed an Equality Act Self-declaration Questionnaire confirming he had difficulty going up and down steps or gradients, "**a total inability to walk**, **or an ability to walk only a short distance without difficulty**, for example because of physical difficulties pain or fatigue."

Occupational Health Report 23 April 2021

39 Occupational health spoke with the claimant on the telephone but wanted a face-to-face meeting to complete a clinical assessment and review medical history. In the meantime adjustments were set out that included "Special duties/fitness, **no getting in and out of vehicles, no twisting, limited walking, unfit for heavy lifting more than 5kg equivalent pull/push and limited use of right arm**" [my emphasis]. The claimant continued in his adjusted ad hoc role which met the adjustments listed, and the respondent was not in breach of its duty to make reasonable adjustments and so the Tribunal found.

2nd Review meeting 29 April 2021

40 The meeting was before Gary McLoughlin, the claimant was accompanied by an experienced trade union official. The claimant confirmed he had "looked at roles a lot tried and while the lads had been working." This information was in direct contrast to the evidence given on cross-examination that the claimant was unable to look at roles, prevented from trying them and stopped from going into other factory areas. The claimant raised no complaints about the availability of trade union or managers refusing him access to the roles, the only issue at the time was if another employee was on a role due to their own physical restrictions that may have suited the claimant more than the employee he "can't step in." Gary McLoughlin explained the respondent "can't unplace someone to place you" which the claimant understood.

41 The claimant was told again that if his medical condition changed he needed to tell the respondent and internal vacancies were available to which the claimant responded, "never look but I should." The MYJLR app that showed vacancies was referenced and the claimant told to register with HR direct in order that he could assess any vacancies and see if they were suitable. At no stage did the claimant make Gary McLoughlin aware that he had difficulties accessing the app on his phone so was unable to look for vacancies and had asked colleagues to open the app on his behalf. It is notable that the claimant did not point to any vacancy which he believed was suitable for him, and it was open for him to do this. The process involved the claimant supported by a knowledgeable union representative looking at any job within the business, whether vacant or otherwise, that he wanted to trial on the basis that the claimant was the best person to assess whether a job was suitable for him or not. It was clear to the Tribunal that the jobs available (not office based) were semi-skilled repetitive physical work and it is not surprising the claimant or his union representative was unable to point the respondent to a suitable alternative given his wide-ranging physical limitations.

42 At the meeting reference was made to the claimant's union representative identifying two jobs he was unable to trial because the lines were down, and Gary McLoughlin directed the claimant to use the job roles trial forms and see how he got on. He confirmed "the clock doesn't start until the lines re-start." Gary McLoughlin had doubts the claimant could carry out the two jobs within his restrictions and was aware that they were being carried out by employees who also had restrictions and they could not be moved to allow the claimant to take over the role instead.

43 Gary McLoughlin confirmed that the claimant would go onto stage 3 and still have an opportunity to find roles, however if he was unable to do so "you will progress to an employment review." The claimant understood this to mean that he could be dismissed if no suitable alternative employment was found.

Occupational Health Report 6 May 2021

44 The claimant underwent a physiotherapy face-to-face assessment and occupational health concluded adjustments should be made on the basis of the claimant:

> "not getting in and out of vehicles,
> no twisting,
> limited walking,
> no gun work,
> no work above shoulder level."

45 The restrictions were to be applied through to 30 April 2022.

46 At this liability hearing the claimant criticised the occupational health report for the fact that it made no reference to him being able to use his left arm/hand arguing it was not detailed enough in respect of how much walking he could do. The undisputed evidence was that occupational health was an internal department of medical specialists with knowledge of the respondent's business including the type of work carried out by employees, The claimant had agreed to the contents of the reports and authorised their release to the manager who commissioned it, in this instance Gary McLoughlin. The Tribunal concluded that had the claimant informed occupational health that he could use his left arm/hand, the report would have reflected this more likely than not. It is notable that adjustment from the earlier report referenced "limited use of right arm" in contrast to the updated report "no work above

shoulder level" which is very specific and there is no suggestion the claimant could work above shoulder level with his left hand, which he was trying to argue before the Tribunal.

Stage 3 meeting 18 May 2021 with Nicholas Teasdale

47 Nicholas Teasdale, manufacturing manager, held the Stage 3 meeting. The claimant was represented by two trade union officials including Steve McGravie who was very experienced and involved in most of the Restricted Worker Processes having represented over time hundreds of employees. The claimant made reference to an ongoing historical hip condition and complained about past events not relevant to this case. The claimant confirmed the jobs were "worse on my arm" and he had been ignored following the earlier occupational health advice. He confirmed "**my hip gives me a lot of problems. I can't get under cars. I can't get in and out of cars**" [my emphasis]. The 6 May 2021 Occupational Health report was read out and the claimant did not contest it was not accurate. He made no mention of using the left arm/hand instead of the right.

48 An agreement was reached that the claimant would trial the two roles mentioned in the previous meeting, and that he would be referred for physiotherapy, which he was with no positive effect. At the meeting the claimant confirmed that his GP had not recommended treatment and he though his condition was "fixed there." The Tribunal found that Nicholas Teasdale genuinely wanted to give the claimant an opportunity to undergo physiotherapy treatment paid for and commissioned by the respondent to give him the best possible chance of finding suitable alternative employment and more time in which to do so, despite the fact that the claimant had between the 29 April and 18 May 2021 to look at and trial the two roles referenced above, and had not done so. Nicholas Teasdale was concerned because of the recommendation by occupational health of the extensive restrictions and had reservations about the roles suggested by the claimant's union representative for the claimant to work on door seals and door arms as it would require above the shoulder movement.

Occupational Health report 8 June 2021

49 Occupational health prepared a further report and confirmed the right elbow condition was "**over 20 years old…is highly unlikely to change with any further therapy**…I have however referred him to our FRP for help with his ongoing let hip pain and restriction" [my emphasis].

50 An email was sent on 2 September 2021 to the manufacturing managers from other technology areas across the plant (body construction, paint, plant quality, launch and press) on a confidential anonymous basis to see if there were any roles available with the claimant's five restrictions taken into account. Within a period of 12 hours the replies confirmed there were none, for example, "all production roles involves some twisting in panel handling." At the liability hearing the claimant questioned how the manufacturing managers could respond within such a short period and carry out an exhaustive search. On the balance of probabilities the Tribunal accepted the evidence given in explanation by a number of the respondent's witnesses that the manufacturing managers were well aware of the jobs in their individual areas, they asked their managers and knew what roles would have been ergonomically suitable because they had to manage and place restricted workers in their own areas and knew the roles already filled with restricted workers. The undisputed evidence before the Tribunal was that the union representatives were also aware of any possible suitable roles, with or without restricted workers in situ and during the period in question the union had suggested the two roles referred to above for the claimant to trial, and no others until it came to the second appeal hearing.

51 Between the 18 May 2021 and 23 September 2021 the claimant trialled the two roles referenced by the trade union representative in earlier meetings and he deemed them unsuitable because of the walking, twisting and turning elements of the door roles and his hip was affected.

Stage 3 adjourned feedback meeting 23 September 2021 with Nicholas Teasdale

52 The claimant accompanied by his union representative confirmed to Nicholas Teasdale that no suitable roles were identified at stage 2, he had undergone 5 sessions of physiotherapy with one session remaining and could not do the roles referenced above because of walking, twisting and turning and hip, it was the walk and turning "take pain killers if it aggravates me more complicated than I realised…I have been doing part of the process but not the full role." The claimant confirmed he had "never explored North Works" which should have been considered at stage 2, but he had been to doorline and trim. Steve McGravie said they would like to explore North Works, and made the point that "you can't put him up without looking at everything."

53 Nicholas Teasdale agreed to adjourn despite making clear his concerns that the claimant had been in the process for over 12 months and was now saying he had no time to trial roles when "the onus is on you to work with us to find a role. We can't drift indefinitely. We are at a serious stage. We need to find a role. **You have to go and look at roles you can do within your restrictions…you need to go straight away and look**" [my emphasis]. At no stage did Steve Mcgravie say the claimant was unable to look because the claimant did not have access to areas in the factory, or access to trade union support. The claimant merely needed more time and this was granted. The claimant understood in no uncertain terms the seriousness of his position.

54 Steve McGravie identified a further three roles that may be suitable for the claimant to trial, and the claimant had "had a go during breaks…he had a good few goes." Steve McGravie confirmed no other roles were available, although there was one possible role but covered by an employee on rested work, and these were the only three roles to be considered. The claimant confirmed he had the opportunity to try all roles, he had been watching during the shift and it was suggested the claimant "have a go" during breaks.

55 Another extended adjournment was agreed in order that the claimant could trial the three roles, and he was asked to complete the paperwork as "the onus is on you to try jobs and to get them signed off if they are suitable." In direct contradiction to the claimant's evidence given at this liability hearing that he had difficulty trialling jobs as a result of lack of union support, the Tribunal concluded the contemporaneous evidence reflected the union was involved from the outset and the claimant supported with union representatives referring suitable possible jobs and obtaining extensions for the claimant to trial them.

56 In a letter dated 1 October 2021 Nick Teasdale referenced the adjournment and listed the roles the claimant was to trial before the reconvened meeting to be held on 26 October 2021. The claimant was also told to be proactive and contact HR about any suitable alternative vacant roles that may be available. There was no evidence before the Tribunal that the claimant did this and concluded at no stage of the process did the claimant register with HR in order that he could be sent possible suitable vacancies to look at and nor did he inform the respondent or HR that he was unable to access this information on his phone. The claimant did not find any vacancies that may have been suitable for him to trial when he asked his colleagues to access the information on his behalf.

Stage 3 adjourned feedback meeting 2 November 2021 with Nicholas Teasdale

57 Steve McGreevy confirmed the claimant had trialled two of the three roles and that a manager John Williams had been "very proactive with him." The claimant accepted he could not do either of those jobs, one because of the kick from the gun and at no time did the claimant or Steve McGreevy indicate the claimant could work using his left hand. The claimant tried one role for 2-days and the other "came to a stop." Nick Teasdale explored with the claimant what was happening with the roles. The claimant confirmed when asked that if he was given more time to learn he could still not do it "realistically." The claimant was asked "so you have had a fair reasonable trial do you agree" and confirmed "yes" and "I think it would flare me condition if I was on it all the time." Steve McGreevy and the claimant reported that John Williams (a manager) had promised to look for a role in North Works, had given the claimant a list of roles to try "and said he would try and look with me…asked me to look at man rider" and it was agreed the meeting would be adjourned again for the claimant to be given the opportunity to trial two roles. The claimant was left in no doubt that how serious the position was and he could be dismissed if no role was found.

58 The claimant completed a trial feedback form from 24 October to 18 November 2021 recording the 7 roles he had unsuccessfully trialled/attempted to trial when another employee was on that duty working with restrictions noting "outside my DDR" or being "stopped because outside my DBR" which was a reference to the restrictions determined by occupational health. In relation to one role referred to as "Engine Lift K203" the claimant noted "John Williams said it was outside my DDR". The claimant requested a platform was put in place "for extra" height in order that he could work without going over shoulder height as this was the only restriction that prevented him from carrying out the role.

Stage 3 adjourned feedback meeting 23 November 2021 with Nicholas Teasdale

59 The claimant was supported by a trade union representative. He confirmed he was prevented from trialling one of the possible jobs "because it was outside my restrictions" and the other job involved using a gun tool and was unsuitable. The claimant did not dispute that he had looked at jobs outside his restrictions having taken the view that they could be "tweaked" for example, by the provision of a box for him to stand on to carry out the Engine Lift K204 role as he needed to be elevated so as not to reach above shoulder height. It was pointed out the claimant had "TU support to look for jobs and trial them" which the claimant did not take issue with, in contrast to his evidence given at the liability hearing that he was not supported. It is notable the claimant responded when asked by Nicholas Teasdale "Have you reviewed all the jobs" that "I've been around multiple times." The Tribunal did not find the claimant's evidence that he had been unable to review the jobs credible, concluding he was supported by the union and respondent, he had trialled jobs, he looked at jobs and the unfortunate reality of the situation was the claimant's physical restrictions were so extensive their cumulatively effect was that no role could be identified and any job breaching his restrictions could result in personal injury and the risk of a personal injury claim based in negligence. Nicholas Teasdale asked the claimant's if he had brought a personal injury claim during the meeting, and the possibility of this was clearly in his mind had the claimant being offered and accepted work that exacerbated his medical conditions.

60 It is notable that in oral evidence the claimant confirmed he was seeking an adjustment via a box whose height was around 2 to 4 inches i.e. as if he was standing on tip toe, and yet the contemporaneous note of the 23 November 2021 meeting recorded the claimant was asking for a 10-inch rise which could affect the overall logistics of the job. The

Tribunal concluded the claimant intentionally reduced the number of inches he was seeking to support his claim and make it look as if the respondent was unreasonably refusing to make a physical adjustment to the workstation, which it did not find the be the case as the 10 inch platform/box was an auxiliary aid which breached the respondent's health and safety policies and put employees, including the claimant, at risk of injury.

61 It was at this meeting Scott Flannery raised the possibility of the claimant working with his left hand "as your job is at stake" to which the claimant did not respond. Nicholas Teasdale encouraged the claimant to stop focussing on isolated aspects of the role and ignore the entirety of the role which would result in his restrictions not being met, and to review/trial any role he thought he may be able to do.

62 In evidence the claimant stated that he had asked Nicholas Teasdale about looking to see if employees working on a job that may be suitable for him but not available because they were a restricted worker on shift A as well as shift B. The claimant worked shift B and he was concerned that the mirror role had a non-restricted worker in situ and he could fill it by changing shift. The problem for the claimant is that neither he nor the union representative asked that question or complained that he had not been given the opportunity to trial a restricted worker's job as conceded by the claimant in evidence on cross-examination. The Tribunal took the view the claimant asked the wrong question when he said, "Can I…go an look for jobs on another shift" to which Nicholas Teasdale responded, "Unless you identify the job that only exists on the other shift, you should stay on your current shift." The Tribunal took the view there was a duty on the respondent to check whether possibly suitable alternative employment was covered by employees on restrictions working shift A and shift B, and if not on shift A whether this was a position the claimant could have taken up.

63 On the balance of probabilities the Tribunal was satisfied that had a shift A non-restricted employee carried out work that could have been suitable for the claimant's restrictions the union representatives and management would have known about it and flagged this to the claimant. The Tribunal concluded the respondent could have been a bit clearer as to what was happening on the two different shifts and whether a possible suitable role was covered on both by employees with restrictions or not. The problem for the claimant is that no role was identified either by himself, the union or managers due to the complexity and breadth of his physical limitations in a working environment where employees as semi-skilled workers were required to carry out strenuous physical tasks on an assembly line or tasks that breached the claimant's restrictions in the process of checking for faults within a time restricted period. The clear evidence before the Tribunal was this was the unfortunate situation throughout the entire process, and apart from providing the claimant with ad hoc duties to be carried out in the claimant's own time and pace, for example, at the claimant's slow walking pace, there was no role the claimant could carry out without putting himself at risk of personal injuries and the respondent to a personal injury claim if any of the medical conditions were exacerbated.

64 Nicholas Teasdale ended the stage 3 process having concluded the claimant had "been given ample opportunity time and time again to review the different processes. You have said yourself you have been going round and round looking for roles. The ones you have identified were outside your restrictions. I have got nowhere to go but to take it to Employment Review (ER)…We have already written to all technologies and got written responses back that there are no suitable roles for you with your restrictions…we've come to the end of stage 3…I will investigate the possibility of having that platform and if it can help you do the job safely. We have to see if that is a reasonable adjustment. We will have that checked before your ER."

RRW Placement Committee Meeting 15 December 2021

65 Ahead of the claimant's employment review a meeting took place on the 15 December 2021 with five manufacturing managers including Gary McLoughlin, two people from occupational health and three people from human resources ("HR"). Under the respondent's RWP procedure trade union representatives should also be in attendance, but were not present. The Tribunal took the view that nothing hangs on this in respect of the claimant's case given the trade union input before and after the Committee meeting. Three roles were suggested as possibly suitable for the claimant including a technical clerk which clearly was not a suitable role for the reasons indicated by the Tribunal i.e. the claimant had no technical expertise whatsoever. One role in GR body loading window role was to be reviewed to see if adjustments were possible with regards to twisting as it required "Rotate body completing step around" and walking.

66 The GT paint shop SIP process role was also to be reviewed as it appeared to accommodate all restrictions and a trial was to be arranged. No other roles were reported, and the notes record that the majority of the roles in Quality required walking around and the position was to be confirmed with the quality manager (who was not in attendance) to see if there were any roles in Quality that could accommodate the claimant's restrictions and be suitable for him to trial. The objective of the monthly committee meeting was for the entire site to search for roles which could be adapted or were suitable for employees with restrictions.

67 In a letter dated 16 December 2021 the claimant was invited to a Employment Review as he was unable to find a suitable role. The claimant immediately raised a written grievance dated 20 December 2021 explaining how he had in Trim, Final and North Works spent **"quite a lot of time going up and down these lines searching for a suitable role without success…after discussions with the trade union it was agreed I would try a number of roles**" [my emphasis] and they were found unsuitable for a number of reasons. The information provided by the claimant in the grievance letter was different to that given in by him in oral evidence at the liability hearing, which was he was unsupported by the union and had difficulty going up and down the lines because of Covid restrictions and not been given the time to do so. The claimant was found not to be a credible witnesses.

Engine Lift K204 role

68 Jason Wilding looked into making a possible adjustment to the Engine Lift K204 role by having a mock up platform installed to give the claimant greater height. An assessment was carried out of the adjustment sought which would have reduced the work above shoulder height for the claimant. The platform was found to breach health and safety and the integrity of the line. As a result of the increased height the claimant would risk of falling over the guard and injuring himself. The claimant's union representative did not dispute the respondent's health and safety assessment at the time. The Tribunal was shown photographs and it preferred the evidence given on behalf of the respondent to that of the claimant who disputed there was a health and safety risk, concluding on the balance of probabilities that a platform/box would affect the overall logistics of the Engine Lift K204 role, result in a health and safety risk and was not a reasonable adjustment.

Employment Review Meeting held on 21 December 2021 with Jason Wilding.

69 Prior to the meeting Jason Wilding was provided with the claimant's written grievance and he took the view that as it related to the RWP it would be considered as part of the Employment Review Meeting. The claimant did not object.

70 The claimant complained that he had been prevented from and not given the opportunity to explore possible roles at North Works alleging John Williams "was not too nice to me" in direct contrast to what was said by the claimant and union representative at earlier meetings as recorded above. A discussion took place about the platform and the claimant confirmed it required a 10-inch rise as an adjustment and was told the maintenance team had reviewed the suggestion which wasn't feasible; "we looked at moving safety threads and having access to the drives so you can take the platform backwards and forwards. The issue we had is a proximity to the next station, as if you put a platform there too, which you have to because of that height, you can't have a step down in that short distance. This would mean that previous process would be right over the engine and this would put you out of balance…we tried to put blue boxes, same height as the platform would be. They were lower than 10 inches…" This analysis was not challenged by the claimant or the union representative who accompanied him at the 21 December meeting.

71 The claimant also raised the possibility that he could use a gun with his left hand "If I do something simple" and raised for the first time during the entire process the issue he had walking around looking at jobs when people were not wearing masks. In short, the Tribunal took the view the claimant was using any argument at his disposal to suggest a fair process had not been followed and delay his dismissal, arguing that somewhere within the organisation there was a suitable job he could do, but he did not know what it was, suggesting possibilities that were rejected by Jason Wilding as they were in breach of the claimant's restrictions. The claimant was clearly unhappy; "I keep doing exercises, I use pain killers, I don't want to give up…" The Tribunal recognise that he was in a very difficult position, however the respondent as confirmed by Jason Wilding, was understandably not prepared to look at the restrictions in isolation but cumulatively, particularly work requiring 9.5 hours of extensive walking on the line.

72 Jason Wilding was unpersuaded with the claimant's argument that he could carry out gun work with his left hand due to the restriction that he could not carry out any gunwork, and the fact the claimant had tried roles involving simple pistol gun work with no success previously. Jason Wilding took the view that he was satisfied with how the RWP had been carried out but would adjourn until January 2022 to give the claimant time to look for any roles which might be suitable. The meeting ended with Jason Wilding stating "there is a little bit of a window. If there are a couple of things you could look at please use this time."

RRW Placement Committee Meeting 26 January 2022

73 At a meeting held on the 26 January 2022 the suggested SIP role in paint was ruled out as it did not fit in with T&F Associate A restrictions (the claimant) as it was a repair and inspection role working above shoulder height and twisting with gun work.

Meeting reconvened 13 January 2022

74 On the 13 January 2022 the employment review meeting continued. The claimant was supported by the same union representative as before.

75 During the adjournment Jason Wilding had taken the opportunity to look at and sample a number of roles concluding they were unsuitable as they did not meet the claimant's restrictions and these were discussed with the claimant. Jason Wilding stated "I took a walk to understand these roles. From reaching and twisting there were still issues. I have taken on board if you don't twist, but walked backwards and moved around." The claimant at this liability hearing criticised Jason Wilding for not allowing him to trial the roles personally, and the Tribunal concluded on the balance of probabilities that there had been a genuine attempt to see if they are suitable, and given they were not the claimant could not personally trial them as this would be a breach of his health and safety. It is unfortunate neither the claimant nor the claimant's union representative were present, however, it would have made no difference as Jason Wilding's conclusions were not challenged by the union in respect of the non-suitability of roles as assessed or that some roles, for example, on the transit board, already had restricted people working on it.

76 The claimant stated things were improving with his shoulder and twisting "all the time, I'm slowly getting better" and submitted at this hearing he was on the mend with walking and twisting "but slowly" and a further occupational health report should have been obtained. Bearing in mind the occupational health conclusions in past reports the Tribunal did not see the value of obtaining yet a further report when the claimant was "slowly improving" as there was no satisfactory evidence that there was suitable alternative employment taking into account the claimant's Equality Act Self Declaration Questionnaire that he had difficulty going up and down steps and gradients and the ability to walk short distances existed for approximately 4-years. The respondent was entitled to rely on the most recent occupational health report assessed against the nature of the job and so the Tribunal found.

77 Jason Wilding held a genuine belief based upon a reasonable investigation including the medical reports, what he had been told by the claimant and the managers involved in the RWP that (a) ordinarily the entire process would be exhausted in a 12 week period, it had been ongoing since September 2020 although some of that time was covered by furlough and non-production, (b) the claimant's restrictions were long term and unlikely to change and his adjustments set out by occupational health on 6 May, 8 June and 9 November 2021 were unchanged with an expiry date of 30 April 2022 which was in over 4 months' time, (c) the claimant had reviewed a number of processes/jobs including 500 in trim and final alone, (d) nobody had come up with suitable alternative employment which accommodated the claimant's wide ranging restrictions, (e) the roles the claimant had even reviewing all had elements of his restrictions involved "which meant you would not be able to carry these out, (f) the Quality team who were not at the committee meeting confirmed there were no suitable roles and (e) the claimant had not applied for any internal vacancies during the processes.

78 The claimant was informed that a decision had been made to dismiss him and his response was that he had been discriminated against and would appeal.

79 A letter dated 19 January 2022 confirming the decision and setting out the claimant's right to appeal was sent to the claimant which included a response to the grievance. The effective date of termination was 13 January 2022.

80 The claimant appealed on the 24 January 2022 setting out his grounds that included his view there must be at least one role he could have carried out with his restrictions given the size of the respondent's operations at Halewood.

Stage 1 appeal hearing

81 Stewart Cornes, manufacturing manager for body construction, heard the appeal on the 23 February 2022. The claimant was supported by his union representative and raised a further ground of appeal that he should have been given the opportunity to review the 12-month maternity cover for a clerk experienced in IT referenced by the Tribunal above. The claimant's trade union representative proposed the claimant should be given the opportunity to try the two roles suggested in the 15 December 2021 RRW Placement Committee meeting in Bodywork and Paint and the hearing was adjourned to 10 March 2022 in order that Stuart Cornes could look at "due diligence."

82 During the adjournment Stewart Cornes, who worked in body construction, was aware from his own investigation when he was accompanied by a member of his team that the GR body loading window role suggested at the 15 December 2021 RRW Placement Committee meeting was unsuitable because it involved bending over, picking panels up, twisting and turning and walking into a load cell before placing the panels, and it could not be adjusted. He had also looked at the role in paint and was satisfied this had been investigated, it required work above shoulder height and a gun and was not suitable.

Reconvened stage 1 appeal hearing 10 March 2022

83 Stewart Cornes met with the claimant and two union representatives on the 10 March 2022 during which the appeal was dismissed. I do not intend to set out the findings in any great detail other than record that there was a genuine attempt on the part of Stewart Cornes to take on board what the claimant had to say in an objective, open and fair manner before concluding "there are no roles to accommodate your restrictions, no matter if TU were standing by your side or not." He did not accept the claimant's point on appeal that there had been no support from the company or the trade union, stating "I have reviewed the notes and I can see that Steve Morris has been involved, John Williams has been involved, Gary McLoughlin… Nick Teasdale and John Wilding…TU were supporting you at every meeting. A numerous adjustments have been taken to ensure you had the opportunity to identify and trial roles. The process has been exhausted." The claimant was advised of his right to appeal, which he did.

84 The appeal outcome dated 16 March 2022 confirmed the reasons why the appeal was unsuccessful including the fact that the roles suggested by the placement committee had been "assessed by both Jason Wilding and myself. Unless the job was suited to your restrictions, no job trial can be arranged. After reviewing the roles, they were not deemed suitable and for that reason were not taken forward to trial" and "after the FRP was completed an outcome report was provided by occupational health on the 9 November 2021. From this report no changes to your current restrictions were made." With reference to the unsuitable technical clerking role Stewart Cornes took the view that it had been advertised and the claimant had not applied for it.

85 The claimant appealed.

Final appeal – stage 2 hearing

86 Ian Holohan heard the stage 2 appeal hearing on the 25 April 2022, and the claimant was accompanied by two union representatives including Steve McGravie, who had also been involved earlier in the process. The notes of the hearing record the claimant's explanation of his medical condition which was as follows: "with my hip its slowly got

worse…my elbow there isn't much you can do and I might need more surgery can't straighten it and no flexion also affects my shoulder from working on laches…my GP has asked if I want another operation…I've had treatment in the past…I've never had issues with my hip until I was on T3…if I had to kneel on bed or to step into a car it takes me over…hip…just gives me a lot of pain and it affects my mobility…if you twist fast it exacerbates this…the physio from OH on my hip that Nick Teasdale put me through. Physio said no physio would improve my condition …[GP] advised the same…I don't have a range of movement so can't even wipe my backside…I would like the opportunity to try the paint inspection role…"

87 Steve McGravie confirmed the claimant "has always been manual worker, but he has elbow issue and undiagnosed condition for his hip…he was left on a job many years that impacted his shoulder" confirming he had supported the claimant "but with breaks…we would like him to try one last role paint inspection in CAR. I've looked at the job…limited bending, eyeball job, checking for defects, no guns…in paint quality there was an employee leaving on Friday – is that a role he can do? There is some PC work but with training he might be able to do this.

88 During the adjournment Ian Holohan looked at the two inspection roles in Paint referred to for the first time at the second appeal hearing before concluding that neither were suitable and there was no point in re-referring the claimant to occupational health given the claimant's update at the appeal hearing as there was no likely improvement and the restrictions identified by occupational health were ongoing.

89 The hearing was adjourned to 27 April 2022 at which the claimant's appeal was dismissed. Ian Holohan confirmed his findings above and in relation to the two new roles "We have reviewed these against multiple roles and what reasonable adjustments can be made – process states there is no RTO role that had been found. For that reason I do not find it reasonable to trial any further RTO roles."

90 The outcome was confirmed in a letter dated 13 May 2022 which dealt with a number of matters including Steve McGravie's request that two further positions be considered within the restricted workers process paint inspection within CAR and T4-SIPS Inspector in Quality and "with regards to not being supported…you have had management and TU support throughout and the fact that you have been in this process for an extended period of time shows we have tried to ensure that you have every opportunity to look for suitable roles…I did take the time to review the two positions that were provided by Steve McGravie but upon looking a these closer, neither role falls within your restrictions…when we looked at the Paint Inspection role the below components of the role would not fall within your restrictions; bending into vehicles during inspections, continuous walking throughout the day during inspections, requirement to lift tailgates and lifting of hoods." The Tribunal accepted Ian Holohan's evidence that the hood and tailgate were heavy and required the claimant to use his hands/arms above shoulder level. A discussion took place as to whether the tailgate could be opened with a fob given the Tribunal's knowledge of Landrover Discovery vehicles and the ability for the tailgate/boot to rise high up in the air automatically. The Tribunal was satisfied with the credible explanation given that the tailgate/boot could not be manoeuvred electronically at that stage of the build. The Tribunal also has knowledge that the vehicles have a lever at the bottom of the well by the left-hand passenger seat that required entry into the vehicle and twisting before the bonnet catch can be released. It accepted as credible Ian Holohan's evidence that the bonnet was heavy and would require a physical movement above shoulder level, and workers would need to twist to move the lever based internally at the floor of the vehicle.

91 With reference to the T4 SIPS inspector role Ian Holohan concluded “the following duties would not fit the restrictions; continuous working throughout the day during inspections, requirement to lift tail gates and lifting of hoods and requirement to lean and bend into vehicles. The role had been split into two stations one associate covering front an left, the other rear and right of the vehicle. Either way the claimant could not have performed the role without breaching restrictions. Ian Holohan held a genuine belief based on a reasonable investigation that the roles suggested were not suitable reasonable adjustments and the Tribunal found the respondent was not in breach of its duty under section 20-21 of the EqA had that duty existed given the fact the claimant was no longer employed, which it did not.

92 Finally, Ian Holohan dealt with the fact that the TU was not present at the placement committee meetings concluding “these meetings are attended by production managers from each side of the technology areas, HR an occupational Health. Whilst the TU di not attend this review, they are heavily involved in the process and do have the opportunity to discuss any suitable roles they may feel fall within an employee’s restrictions during the restricted worker process an final stage meetings.”

Law

Unfair dismissal

93 Section 94(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2)(a)) includes capability of the employee as being a potentially fair reason for dismissal.

94 ‘Capability’ is defined in S.98(3)(a) ERA as ‘*capability assessed by reference to skill, aptitude, health or any other physical or mental quality’*.

95 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

96 In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, consultation and procedure followed, without substituting itself for the employer in relation to the dismissal whether the reason be conduct or as in the case of Mr Hoare capability.

97 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the “band of reasonable responses” test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

98 The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Disability discrimination – failure to make reasonable adjustments

99 This is a case that involves PCP's and a physical feature/auxiliary aid in respect of the platform/box.

100 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

101 The following matters are key for the Tribunal to decide and I have set out some of the law under the headings:

1.1 What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

1.2 How does that PCP/physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

1.3 Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

1.4 Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service?

1.5 Is the claim brought within time?

102 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal

rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

103 In the well-known case **Secretary of State for Work and Pensions (Job Centre Plus) v Higgins** [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

The PCP

104 In **Lamb v The Business Academy Bexley EAT 0226/15** the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

105 The purpose of the comparison exercise is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. It must be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20 –**Sheikholeslami v University of Edinburgh [2018] IRLR 1090***:* "The purpose of the comparison exercise with people who are not disabled…is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

106 A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - **Royal Bank of Scotland v Ashton [2011] ICR 632.**

Knowledge

107 With reference to the knowledge defence in paragraph 20 of Schedule 8 EQA the defence will succeed unless the Tribunal is satisfied that the employer had knowledge (either actual or constructive) of both the disability and the substantial disadvantage.

Reasonableness of adjustments

108 The statutory duty is for the respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard **- Smith v Churchills Stairlifts plc [2005]** EWCA 1220*.* It is important to identify precisely the step which could remove the

substantial disadvantage complained of - **General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.**

109 The factors found in paragraph 6.28 of the Code is a reminder of some of the factors likely to be relevant to reasonableness. An important consideration is the extent to which the step will prevent the disadvantage. The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid.

110 Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT**; **Project Management Institute v Latif [2007] IRLR 579, EAT**.

111 Paragraph 6.8 of the Code says that the duty to make reasonable adjustments applies at all stages of employment including dismissal.

112 Ms Rumble referred to **HM Prison Service v Johnson 2007 IRLR 951, EAT,** Mr Justice Underhill stated that a tribunal must identify with some particularity what 'step' it is that the employer is said to have failed to have taken in relation to the disabled employee. Mr Hoare has failed to identify this or the role that he could have taken up within the business as a reasonable adjustment.

113 the mental processes of the employer are irrelevant when determining whether adjustments were available and reasonable When identifying what step(s) it was reasonable for the employer to take, the focus must be purely on the position at the time the relevant decision was taken (or not taken).

Burden of proof

114 Section 123(3)(b) EqA provides that a failure to do something is to be treated as occurring when the person in question decided on it. If an employer positively decides not to make a reasonable adjustment time will run from that point: **Humphries v Chevler Packaging Ltd EAT 0224/06.**

115 The Court of Appeal in **Matuszowicz v Kingston Upon Hull City Council [2009] ICR 1170** held where there was no clear moment in time where the employer consciously decided not to make the adjustment in question this engaged section 123(4) which specifies when a person is deemed to have decided to fail to do something. There are two alternatives:

115.1 when the person does an act inconsistent with making the adjustment;

or

115.2 at the end of the period in which the person might reasonably have been expected to have made the adjustment.

116 An obligation to make an adjustment can be found to be a "continuing state of affairs" meaning that the duty was breached every day – see for example **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil UKEAT/0097/13.** The importance of the just and equitable extension was emphasised in **Matuszowicz** (above) and **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (CA)** in which the

court also emphasised the difference between the date when the duty to make reasonable adjustments arose and the date by which an employer might reasonably have been expected to have made those adjustments, setting time running.

117 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

118 In **HM Prison Service v Johnson** (above) the EAT made it clear that it is insufficient for a claimant simply to point to a substantial disadvantage caused by a PCP or physical feature or lack of auxiliary aid, and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage. In **Project Management Institute v Latif 2007 IRLR 579, EAT**, Mr Justice Elias (then President of the EAT) expressly approved guidance on the application of the burden of proof in reasonable adjustment cases contained in the Code of Practice issued by the former Disability Rights Commission ('the Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability') (see para 4.41). Elias P observed that 'in our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. **There must be evidence of some apparently reasonable adjustment which could be made** [my emphasis]. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.' This is relevant to Mr Hoare's case.

119 In determining whether the respondent discriminated the guidelines set out in **Barton v Investec Henderson Crossthwaite Securities Limited [**2003] IRLR 332 and **Igen Limited and others v Wong** [2005] IRLR 258 apply, as affirmed in **Ayodele v CityLink Ltd** [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

120 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected him to the discrimination alleged and the burden has not shifted. If the Tribunal is wrong on its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent untainted by disability discrimination and it had not failed in its duty to make reasonable adjustments.

Conclusion: unfair dismissal.

121 With reference to the first issue, the reason for dismissal was capability as the claimant was unable to carry out his contractual role (or any other role within the respondent's organisation), a potentially fair reason under s98(2) Employment Rights Act 1996.

122 With reference to the second issue, namely, did the respondent act reasonably in all the circumstances of the case, following a fair procedure, in treating that reason as sufficient to warrant dismissal, the Tribunal found that it did taking into account the factual matrix set out above. Jason Wilding held a genuine and honest belief based on the information before him gathered from Gary McLoughlin who conducted stage 2 of the Restricted Workers Process aimed at getting employees with physical restrictions back to work, Nicholas Teasdale who dealt with stage 3, the various union representatives and managers consulted throughout coupled with the claimant's confirmation as to the wide ranging extent of his physical restrictions recorded throughout the process. Ms Rumble reminded the Tribunal in closing submissions that in oral evidence the claimant stated "I *can't carry on in role,"* it would be "*cruel*" to expect him to do so and he would *"Just end up leaving anyway if had to continue the role".*

123 From the time it became clear to the respondent that the claimant could no longer carry on with his contractual role working on the assembly line fixing bonnet latches when he stopped the line due to pain which he states was attributable to using heavy equipment, adjustments were made. The claimant argues that the pain he suffered was caused by the respondent, and therefore he should not have been dismissed. Before that incident, despite the occupational health reports dated 16 September and 2 October 2019 suggesting temporary adjustments, the claimant continued to carry out his duties for which the respondent can be criticised given the fact that according to occupational health and the claimant, no temporary adjustments were put in place until much later. It is clear the claimant had a long-standing physical condition before the occupational health adjustments were suggested, and his duties were changed on the 8 September 2020 after he was shielding at home due to being classed as "extremely vulnerable" due to asthma. There was no requirement for the respondent to make adjustments when the claimant was shielding from home, reasonable adjustments were made before the claimant was dismissed and there was no reason why the events in 2019 gave rise to an unfair dismissal, given all of the reasonable steps taken by the respondent when the claimant returned from furlough.

124 Following the claimant's return from furlough there were numerous meetings with him to discuss reasonable adjustments and it was entirely suitable for the respondent to ask the claimant to look and trial roles which he deemed suitable given he was the one best placed to assess the effect on his physical restrictions if the role looked suitable on the face of it. It was also entirely reasonable for the respondent to stop the claimant trialling any role that went against occupational health advice (which the respondent followed) and clear indications were given by the claimant as to the considerable effect of all his medical conditions on his ability to carry out a semi-skilled role however number of individual positions there were throughout the business. The claimant was experienced, he knew the consequences of not finding alternative employment and was warned on numerous occasions by different managers that dismissal may be the outcome if no alternative position was found. It is notable the claimant has not pointed to any job that was suitable for him within the business either prior to his dismissal or at this liability hearing.

125 The respondent complied with the ACAS Code; as recorded in the findings of facts and it undertook a thorough and careful series of consultation meetings and investigations before dismissal including occupational health reports agreed by the claimant which the respondent was entitled to take into account. The claimant argued that immediately prior to his dismissal his health was improving and a further medical report should have been obtained and the respondent should have taken into account the possibility of him working with his left hand even though he was right handed. The Tribunal did not find that a reasonable employer, objectively accessed, would have taken these steps. The occupational report was current in its effect, having concluded the right elbow condition was highly unlikely to change and extensive physiotherapy had already been undertaken in respect of hip pain with no benefit or improvement. The claimant himself confirmed the permanency of his condition and agreed the five restrictions (no getting in and out of vehicles, no twisting, limited walking, no gun work and no work above shoulder level) would remain in place until at least 30 April 2022, evidenced by the fact that he authorised the release of the occupational health report and did not question or raise any issue with the conclusions reached during the consultation process.

126 As can be seen from the findings of facts above the claimant's condition was discussed again at the appeal hearing and it had far from improved; he was not able to return to work and carry out any duties on the assembly line without adjustments that would not have been possible due to the nature of the work as described at the outset of these reasons. The Tribunal found the claimant was prepared to say anything to put off the inevitable and delay his dismissal for a further period of time, despite the lengthy consultation period and adjournments granted with a view to the claimant finding suitable alternative employment that took into account all of his medical conditions. The respondent, the trade union and the claimant were unable to find suitable alternative employment. The Tribunal found that removing another employee who needed adjustments from their adjusted duties was not the answer, and there was no satisfactory evidence that employees who did not require or no longer required adjusted duties on any shift, were taking up an alternative role suitable for the claimant.

127 The claimant also argued the respondent failed to search for an alternative role throughout the whole business. The Tribunal did not agree, and found it had as recorded above. It is sufficient to make contact with heads of department with confidential details of the claimant's restrictions and there was nothing untoward about the replies being given in a short period of time. The claimant had access to HR which he did not take advantage of, and he was advised throughout by the union representatives who were experienced in the

work entailed on production lines and would have been aware of any role that may have suited the claimant for the claimant to look at and trial, which he did a number of times.

128 The Tribunal found the consultation meetings following the Restricted Worker Procedure was carried out fairly an objectively, they were not a sham but a genuine attempt to secure the claimant alterative employment and listen to what he and the union representatives had to say. The respondent is proud of the fact that the Restricted Worker Procedure is effective with most employees being retained within the business following adjustments being made, and values the relationship it has with capable and competent trade union representatives who assisted it to retain employees who might otherwise have been dismissed by reason of incapacity.

129 The decision to dismiss the claimant fell well within the band of reasonable responses open to a reasonable employer. The claimant could not have continued in artificially created post and it was not reasonable for the respondent to be expected to make up a non-existent post for him. The claimant was contractually required to work as a Production Operative and no suitable alternative employment was available. Office or computer work was not suitable as the claimant had no skill in this direction; he had difficulty using his mobile phone and training the claimant to take on specialist office work as an alternative to his semi-skilled physical role was not a realistic or reasonable alternative.

130 The Tribunal did not accept the claimant's argument that he should have been placed in a role which breached the five restricted activities laid down by occupational health on the basis that he could have used equipment with his left hand and taken longer to carry out the duties/stook on a plinth/box despite the health and safety risk. The suggested adjusted duties were not reasonable and the Tribunal accepted they potentially left the respondent open to a negligence action, especially given the claimant's indication in 2019 that his duties had exacerbated his disability. In short, the business requires its semi-skilled employees working on the assembly line to carry out physically strenuous repetitive work within a set period of time (86 seconds) each job depending on completion of the other as the car moved down the line to completion. It was not reasonable to expect the respondent, whatever the size of its undertaking, to change the way the whole assembly line worked, and there was no evidence before the Tribunal that had it done so the claimant's physical restrictions could have been accommodated in line with occupational health's requirements.

131 In conclusion, the claimant was not unfairly dismissed and his claim for unfair dismissal is not well founded and is dismissed.

132 There is no requirement for the Tribunal to consider the issue if the employer acted unfairly procedurally, what are the chances the employment would nevertheless have ended by fair dismissal if a fair procedure had been followed. In the alternative, it would have gone on to find on the evidence before it that the claimant would still have been dismissed on the effective date of termination because he was not capable of carrying out his contractual duties, there were no reasonable adjustments which could have been put in place, and no alternative roles he could have fulfilled safely.

Disability

133 The Respondent accepts that the Claimant was a disabled person as a result of his and asthma at all material times 9 September 2020 to 13 January 2022. The Respondent accepts knowledge of the ulnar neuritis only.

134 With reference to the issue, namely, did the respondent know or ought reasonably to have known the Claimant suffered a disability (asthma), the Tribunal found it knew or ought reasonably to have known when the claimant was assessed by the respondent on the 29 May 2020 as being “extremely vulnerable” due to his asthma condition and by his reference to asthma as the reason for not working on carpets forwarded to occupational health. Ms Rumble reminded the Tribunal the accepted in cross-examination that he did not raise his asthma condition with any of the managers referenced above, throughout the relevant period on the basis that it was a personal matter. Accordingly, whilst the Tribunal found the respondent knew or ought to reasonably have known of the claimant’s asthma, the Tribunal is satisfied the managers who conducted the RWP had no knowledge the claimant was asthmatic and disabled as a result, and nor was it reasonable to expect them to posses such knowledge given the position taken by the claimant.

s.20 Equality Act 2010: REASONABLE ADJUSTMENTS

135 With reference to the first issue, namely, has the respondent imposed a provision, criterion or practice (PCP) which places or placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled contrary to section 20(3) of the Equality Act 2010, the Tribunal found it did. The respondent had a practice of applying a Restricted Worker Process when employees were unable to carry out their contractual job role in order to find suitable alternative employment so that they can remain in the business. The claimant is correct that employees must carry out their contracted job role and this amounts to a practice, as conceded in oral submissions by Ms Rumble. However, the practice must be viewed in context of the Restricted Worker Process and the PCP relied on by the claimant is not entirely correct because from the time the claimant returned to work after national lockdown on the 8 September 2020 the claimant was not carrying out his contractual duties, instead he was placed in an artificial role pending suitable alternative employment being found.

136 It appears to the Tribunal that what the claimant is really complaining about is his dismissal on the basis that up to this point reasonable adjustments were made. As found by the Tribunal in relation to the unfair dismissal, the requirement to work in an RTO role (as a Production Operative) was an essential and continuing condition of employment for all employees working on the assembly line.

137 With reference to the issue, namely, did this practice amount to a PCP that put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, the Tribunal found that it did for the simple reason that he could no longer fulfil his contractual duties. For the reasons set out above, the Tribunal is satisfied that the respondent had knowledge of both the disability and the substantial disadvantage.

138 .With reference to the key issue, namely, did the respondent take such steps as were reasonable to take to avoid that disadvantage, the Tribunal found that it did. As soon as the claimant was unable to carry out his original role and the line was stopped, the claimant never returned to it. There was no duty to make adjustments when the claimant was at home on furlough, and as soon as he returned to work the Restricted Worker Process began and suitable reasonable adjustments were made. The claimant contends that the reasonable adjustment would have been to allow him to undertake an alternative role within the factory. For the reasons stated above, which the Tribunal does not intend to repeat, it did not agree. The claimant has not satisfied the burden of proof, and there is no satisfactory evidence that anything could be done to alleviate the substantial disadvantage i.e. his dismissal, as there was no suitable alternative role available that could have taken into account all of the

claimant's physical restrictions. In short, it would not have been reasonable to provide the claimant with work that breached occupational health's recommendations and the claimant's health and safety. Providing the claimant (who has been unable to point to any suitable role) with any unspecified role within the business as an adjustment would not have ameliorated the disadvantage.

s.123 Equality Act 2010: Time Limits

139 With reference to the issue, namely, are the discrimination complaints relating to the period between 19 September 2019 - 23 March 2020 outside the primary limitation period, the Tribunal found that it was. The claimant's case as its strongest is the last possible date for the breach of duty to make reasonable adjustments as a continuing act was 23 March 2020. After this the claimant was either on furlough at home or working with reasonable adjustments having been put in place until his dismissal. The claimant put forward no satisfactory reason why he failed to issue proceedings within the statutory time limit. The claimant commenced early ACAS conciliation on the 23 February 2022, just under approximately 2 years after the alleged breach of duty to make adjustments.

140 With reference to the issue, namely, was the claim brought in such other period as the employment tribunal thinks just and equitable, the Tribunal found that it was not. Whilst s.123(1)(b) EqA allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time. A Tribunal should not extend a time limit unless the claimant can demonstrate that it is just and equitable to do so as confirmed in the Employment Appeal Tribunal case of **Robertson v Bexley Community Centre [2003] IRLR 434** referred to the Tribunal by Ms Rumble. The claimant has not demonstrated this.

141 In **British Coal Corporation v Keeble [1997] IRLR 336,** the Employment Appeal Tribunal indicated that the Tribunal's discretion is as wide as that of civil courts under section 33 of the Limitation Act 1980. There is no legal obligation to go through the list set out. In short, I find that the delay is lengthy, there was no good reason for it and as a result the cogency of the respondent's evidence has been affected. All the Tribunal has is two occupational health reports for the period on question, and the claimant's evidence that he was unable to carry out his contractual role, which was not the case according to occupational health advice and the facts in this case. As recorded above, the claimant continued to work satisfactory and keep up with the line until he dropped the Bluetooth gun and the assembly line stopped. This incident took place immediately before the claimant was furloughed. The substantial delay has prejudiced the respondent in respect of allegations post September 2020 following which records were kept of the Restricted Worker Process. No records apart from occupational health could be found for 2019. The balance of prejudice falls on the side of the respondent, the claimant having chosen not to take matters further, and the reason for this was that he was satisfied with the adjustments made post September 2020 until dismissal. The Tribunal has reached this decision in the knowledge that it frequently has to consider allegations that go back a long time and the passage of time inevitably impacts on the cogency of the evidence unless a proper written record is kept. In the claimant's case the fact he did not have a good reason for the delay was not decisive, and the Tribunal has taken into account he chose not to take action, there is no satisfactory evidence that a continuing state of affairs existed at the relevant period, and directly as a result of the substantial delay the respondent has suffered prejudice.

142 In conclusion, the complaint of disability discrimination brought under section 20 to 21 of the Equality Act 2010 for the period between 19 September 2019 - 23 March 2020 was received outside the primary limitation period, it is not just and equitable to extend the time limit to 12 April 2022 and the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

Employment Judge Shotter
13.3.23

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 March 2023

FOR THE SECRETARY OF THE TRIBUNALS